



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2012

Ms. Myrna S. Reingold
Galveston County
722 Moody, 5th Floor
Galveston, Texas 77550

OR2012-15193

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 466111.

The Galveston County Precinct 4 Commissioner's Office (the "commissioner's office") received a request for all e-mails from three e-mail accounts that include references to two named individuals during a specified period. You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, 552.130, 552.137, and 552.147 of the Government Code.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note some of the information you have submitted was created after the date the commissioner's office received the request for information. The Act does not require a governmental body that receives a request for information to release information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1–2 (1990). Thus, the information we have marked is not responsive to the request. This ruling does not address the public availability of information that is not responsive to the request, and the commissioner's office is not required to release non-responsive information.

¹Although you raise section 552.024 of the Government Code, we note this provision is not an exception to disclosure. Rather, it permits a governmental body to redact information subject to section 552.117 without the necessity of requesting a decision from this office if a former or current official or employee has made a proper election to keep personal information confidential. *See Gov't Code § 552.024(c)*.

Next, we address your arguments that some of the remaining information is not subject to the Act. The Act is applicable to “public information.” Gov’t Code § 552.021. Section 552.002 of the Act provides that “public information” consists of “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” *Id.* § 552.002(a). The characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an official or employee of a governmental body or whether a governmental body has a particular policy or procedure that establishes a governmental body’s access to the information. *See* Open Records Decision No. 635 at 3–4 (1995) (finding that information does not fall outside definition of “public information” in Act merely because individual official or employee of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees’ homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that a governmental body does not possess the information at issue does not take the information outside the scope of the Act. *See* ORD 635 at 6–8. Furthermore, this office has found information in a public official’s personal e-mail account and home telephone records may be subject to the Act where the public official uses the personal e-mail account and home telephone to conduct public business. *See* ORD 635 at 6–8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act). We note the Act’s definition of “public information” does not require a public employee or official to create the information at the direction of the governmental body. *See* Gov’t Code § 552.002. Accordingly, the mere fact that a public employee generates business-related information using personal resources does not take the information outside the scope of the Act.

You assert the e-mails at issue were generated by the commissioner using his personal e-mail account and concern personal political and campaign matters that do not relate to the official business of the commissioner’s office. Based on your representations and our review, we agree the e-mails at issue do not concern the transaction of official public business. Accordingly, the e-mails you have marked are not “public information” and are not subject to the provisions of the Act.²

Section 552.108 of the Government Code exempts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A). Section 552.108 may be invoked by the proper custodian of

² As our ruling is dispositive, we will not address your remaining arguments for this information.

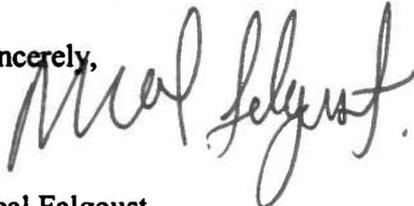
information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. You state and provide a representation that the Galveston County Criminal District Attorney's Office (the "district attorney's office") objects to disclosure of the submitted information because its release would interfere with a pending criminal investigation. Based on your representation and our review, we conclude release of the remaining information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975)(court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, we conclude the commissioner's office may withhold the remaining information under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office. As our ruling is dispositive, we do not address your remaining claimed exceptions.

In summary, the e-mails you have marked are not subject to the provisions of the Act and need not be released. The commissioner's office may withhold the remaining information under section 552.108(a)(1) of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 466111

Enc. Submitted documents

c: Requestor
(w/o enclosures)